

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAY -3 2012

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2011-0377-PR
	)	DEPARTMENT B
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
CARLOS ANGEL TRUJILLO JR.,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20111275001

Honorable Deborah Bernini, Judge

REVIEW GRANTED; RELIEF GRANTED

\_\_\_\_\_  
Carlos A. Trujillo Jr.

Buckeye  
In Propria Persona

\_\_\_\_\_  
E S P I N O S A, Judge.

¶1 Petitioner Carlos Trujillo Jr. seeks review of the trial court’s order dismissing his of-right notice of post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. Although we will not reverse a trial court’s ruling in a Rule 32 proceeding “absent a clear abuse of discretion,” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007), we find such here and grant Trujillo relief.

¶2 Pursuant to a plea agreement, Trujillo pled guilty to theft of a means of transportation. On July 19, 2011, the trial court imposed an enhanced, “slightly mitigated” five-year term of imprisonment. Thereafter, on October 21, 2011, Trujillo’s pro se, of-right notice of post-conviction relief was filed in the superior court. In the notice he claimed he had been “sentenced under unconstitutional guidelines” and “should have been sentenced under first time offenses guidelines.” The trial court summarily dismissed the notice, which had been filed four days beyond the ninety days allowed by Rule 32.4(a), as untimely.

¶3 Trujillo filed a motion for reconsideration, asserting he had given the notice “to a prison official for mailing” on October 12, 2011, and arguing “[u]nder the prison mail rule, legal mail is considered mail[ed] when a prisoner hands it to a prison official.” He attached a copy of a document purporting to be “his mailing receipt showing the date and the prison official[’]s signature and badge number.” The court denied the motion without explanation. Trujillo then petitioned this court for review, again asserting he had given his notice to prison officials before the Rule 32.4 deadline and the trial court had therefore abused its discretion in dismissing his petition and in denying his motion for reconsideration.

¶4 In *State v. Rosario*, 195 Ariz. 264, ¶ 10, 987 P.2d 226, 228 (App. 1999), this court determined that because a prisoner is forced to rely on prison officials to timely post his mail, pro se notices of post-conviction relief filed by a prisoner “must be considered timely filed” if he or she gave the notice to the Arizona Department of Corrections (ADOC) for mailing within the time limit imposed by the rules. In that case, Rosario had provided the trial court no evidence to support his assertion that he had timely given the notice to ADOC. *Id.* The case was therefore remanded, first for the trial court to consider whether any evidence Rosario might submit supported a colorable claim that the notice was timely filed, and if so, then for an evidentiary hearing on the issue. *Id.* ¶ 11.

¶5 In this case, Trujillo provided evidence in support of his claim that he had timely given his notice to ADOC. That document, which has “Arizona Department of Corrections Inmate Request for Withdrawal” and an ADOC logo at the top, states “Legal Mail” in a box titled “Reason,” is dated within the ninety days, and is purportedly signed by Trujillo and an ADOC staff member. The document was sufficient to raise a colorable claim that he had timely given his notice to ADOC for mailing and, if its contents are true, would entitle Trujillo to relief. *Cf. Mayer v. State*, 184 Ariz. 242, 245, 908 P.2d 56, 59 (App. 1995) (when no clear record of date appellant gave notice to prison authorities, case remanded to trial court, noting pro se prisoner could establish timely filing if prison logged outgoing legal mail).

¶6 We therefore grant Trujillo’s petition for review and grant relief, remanding this matter to the trial court for an evidentiary hearing to determine whether Trujillo timely gave his notice to ADOC officials, thereby timely filing it for purposes of Rule 32.4.

/s/ Philip G. Espinosa  
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez  
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly  
VIRGINIA C. KELLY, Judge